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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Gerald Byerly,) No. CV-04-0323-PHX-FJM
10 Plaintiff,)
11 vs.) **ORDER**
12 Deputy Warden, et al.,)
13 Defendants.)
14 _____)
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17 The court has before it defendant's Motion for Summary Judgment (doc. 66),
18 plaintiff's Response (doc. 69), and defendant's Reply (doc. 88); defendant's Motion to Strike
19 the affidavit of plaintiff's expert (doc. 72), plaintiff's Response (doc. 78), and defendant's
20 Reply (doc. 81); and defendant's Motion to Strike Plaintiff's Supplemental Rule 26(a)(2)
21 Disclosure (doc. 83), plaintiff's Response (doc. 85), and defendant's Reply (doc. 90). We
22 also have before us defendant's unopposed Motion for Leave to File Supplemental Statement
23 of Facts (doc. 87), plaintiff's Petition for Writ of Habeas Corpus Ad Testificandum (doc. 92),
24 and a Joint Motion to Expedite Ruling on Pending Motions (doc. 93).

25 I.

26 In this section 1983 case, plaintiff alleges that his Eighth Amendment rights were
27 violated when he was assaulted by other inmates while incarcerated at the Alhambra
28 Reception Center ("Alhambra Facility"). The only remaining defendant in this action is Dora

1 B. Schriro, who was serving as the Acting Director of the Arizona Department of Corrections
2 ("ADC") during the relevant time frame. Plaintiff claims that defendant Director Schriro
3 does not have an adequate policy to protect inmates convicted of sex offenses who seek
4 protective confinement. He requests compensatory and punitive damages, as well as an order
5 requiring the ADC to rewrite its policies regarding the safety of sex offenders at the
6 Alhambra facility.

7 On September 24, 2003, plaintiff was transferred from the Maricopa County jail to
8 ADC's custody at the Alhambra Facility and was placed with other inmates in the intake
9 holding cell, awaiting processing. Shortly after his arrival at the Alhambra Facility, plaintiff
10 met with a correctional officer and requested placement in protective segregation because of
11 threats he had previously received while housed at the Maricopa County jail. Plaintiff
12 claimed he had been threatened by another inmate after it became known that he was a sex
13 offender. Once plaintiff requested protective segregation, he was placed in protective
14 segregation review status, separated from general population inmates, and housed in cell
15 D175, a 14-man cell with 13 other inmates who had also requested protective segregation.
16 Plaintiff claims that the next day, on September 25, 2003, while housed in cell D175, he was
17 beaten by at least two other inmates.

18 Plaintiff now argues that the protective segregation policy at Alhambra, which
19 allowed him to be placed in a congregate cell with other prisoners, whose status and danger
20 to others had not been investigated, created a substantial risk of serious harm in violation of
21 his Eighth Amendment rights.

22 II.

23 The Prison Litigation Reform Act of 1996 ("PLRA") mandates exhaustion of available
24 administrative remedies for all inmate section 1983 claims regarding prison conditions. 42
25 U.S.C. § 1997e(a). We previously denied defendant's Motion to Dismiss this action for
26 plaintiff's failure to exhaust administrative remedies. Order (doc. 46). We concluded that
27 dismissal was improper at that stage because defendant had not provided sufficient evidence
28 for us to determine whether plaintiff failed to exhaust available administrative remedies,

1 where a disputed issue of material fact remained as to whether plaintiff was denied access
2 to the grievance process. Defendant has not presented any new evidence to show that
3 plaintiff failed to exhaust his administrative remedies, and therefore we do not reconsider that
4 issue here.

III.

6 It is well established that prison officials have a duty under the Eighth Amendment
7 "to protect prisoners from violence at the hands of other prisoners." Farmer v. Brennan, 511
8 U.S. 825, 833, 114 S. Ct. 1970, 1976 (1994). In Farmer, the Supreme Court set out a two-
9 pronged test to determine whether a failure to protect an inmate from assault by other inmates
10 rises to the level of a constitutional deprivation. Id. at 834, 114 S. Ct. at 1977. First, the
11 inmate must make an objective showing that "he is incarcerated under conditions posing a
12 substantial risk of serious harm." Id. Second, the plaintiff must make a subjective showing
13 that the prison official had a "sufficiently culpable state of mind." Id. In other words, the
14 official must have acted with "deliberate indifference to inmate health or safety." Id.
15 (quotation omitted). A prison official "is not liable under the Eighth Amendment for denying
16 an inmate humane conditions of confinement unless the official knows of and disregards an
17 excessive risk to inmate health or safety; the official must both be aware of the facts from
18 which the inference could be drawn that a substantial risk of serious harm exists, and he must
19 also draw the inference." Id. at 837, 114 S. Ct. at 1979.

20 ADC's protective segregation policy is set forth in Director's Instruction 67 ("DI 67"),
21 the stated purpose of which is to provide procedures for identifying and safeguarding inmates
22 with legitimate protection needs. Upon entering the Alhambra Facility, inmates are advised
23 that protective segregation is available to any inmate with a verifiable need. If an inmate
24 feels the need to request protective segregation, he or she can ask any staff member at any
25 time. DSOF ¶ 14.

When plaintiff requested voluntary placement in protective segregation, he was promptly separated from the general population inmates, was placed in DI 67 protective segregation review status, and was housed in cell D175, a 14-man cell with 13 other inmates

1 who had also requested protective segregation. Although he concedes that he was promptly
 2 removed from the general population, he contends that his placement in a cell with other
 3 prisoners who claimed the need for protective segregation, but whose status and danger to
 4 others had not been investigated, presented a "substantial risk of serious harm, in a manner
 5 that was 'deliberately indifferent' to inmate health or safety." Plaintiff's Response at 7.

6 Plaintiff's only support for his contention that DI 67, as implemented at the Alhambra
 7 Facility, violated his Eighth Amendment rights is the affidavit of his expert, Charles
 8 Montgomery, alleged to be "a nationally recognized independent expert in the field of
 9 corrections." Montgomery Affidavit ¶ 1. In order to establish that the first prong of Farmer,
 10 that conditions of his confinement presented an objective, "substantial risk of serious harm,"
 11 Mr. Montgomery opined that "[t]he thorough identification of all inmates is essential and
 12 critical to the determination of where to house an inmate to ensure their physical safety and
 13 provide them reasonable protection from violent attacks by other inmates." Id. ¶ 19. Mr.
 14 Montgomery further stated that, based on his experience, there are some inmates who request
 15 protective segregation in order to "attack and harm those inmates who have sought protective
 16 segregation for legitimate reasons." Id. ¶ 22.¹

17 Here, there is little, if any, information presented as a factual basis to support the
 18 opinions expressed by Mr. Montgomery in his affidavit. Mr. Montgomery simply opines
 19 that, based on his own experience, inmates without a legitimate need seek protective
 20 segregation for the purpose of assaulting other inmates. Accordingly, Mr. Montgomery
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 24 ¹In her Motion to Strike the Montgomery affidavit (doc. 72), defendant argues that the
 25 opinions expressed by Mr. Montgomery in his affidavit are unsupported by any factual basis
 26 as required by Rule 56(e), Fed. R. Civ. P., and Rule 705, Fed. R. Evid., and therefore should
 27 be stricken. Defendant also filed a Motion to Strike Plaintiff's Supplemental Rule 26(a)(2)
 28 Disclosure based on plaintiff's failure to file a proper Rule 26(a)(2) expert report. Because
 we grant defendant's Motion for Summary Judgment even when considering the Montgomery
 affidavit and the so-called Rule 26(a)(2) report, we deny both of these Motions as moot
 (docs. 72, 83).

1 concludes that housing inmates seeking protective segregation with other inmates who have
2 not received a risk screening creates a substantial risk of serious harm.

3 Generally speaking, in the context of a motion for summary judgment, "an expert must
4 back up his opinion with specific facts." United States v. Various Slot Machines on Guam,
5 658 F.2d 697, 700 (9th Cir. 1981). A party cannot defeat summary judgment by "replac[ing]
6 conclusory allegations of the complaint or answer with conclusory allegations of an
7 affidavit." Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888, 110 S. Ct. 3177, 3188
8 (1990). Although it is doubtful whether the opinions expressed in the Montgomery affidavit,
9 supported only by the expert's "own experience," are sufficient to establish that the
10 implementation of DI 67 at the Alhambra Facility created a substantial risk of serious harm,
11 we need not reach that issue because there is no evidence presented to establish the second
12 prong of Farmer, that the defendant acted with "deliberate indifference to inmate health or
13 safety." Farmer, 511 U.S. at 834, 114 S. Ct. at 1977.

14 Plaintiff again relies exclusively on the Montgomery affidavit to establish that
15 Director Schriro acted with "subjective recklessness" or "with a conscious[] disregard [of a]
16 substantial risk of serious harm." Id. at 839, 114 S. Ct. at 1980. Mr. Montgomery opined
17 that "[a]ny responsible prison official would know that Defendant's policy of placing
18 unidentified and unclassified inmates together into a congregate cell would present an
19 obvious substantial risk to the inmates' safety." Montgomery Affidavit ¶ 11. Without
20 providing a factual basis for his opinion, Mr. Montgomery simply states that "to a high
21 degree of probability and certainty Director Schriro knew that injury was substantially certain
22 to occur" because "any responsible prison official would know." Id. This is insufficient to
23 establish the subjective knowledge requirement of Farmer.

24 In Farmer, the Supreme Court held that a prison official is not liable unless he or she
25 subjectively "knows of and disregards an excessive risk to inmate health or safety." Farmer,
26 511 U.S. at 837, 114 S. Ct. at 1979. The Court expressly rejected the argument that "a prison
27 official who was unaware of a substantial risk of harm to an inmate may nevertheless be held
28 liable under the Eighth Amendment if the risk was obvious and a reasonable prison official

1 would have noticed it." Id. at 841-42, 114 S. Ct. at 1981. Although a factfinder may infer
2 actual knowledge where evidence establishes that "a substantial risk of inmate attacks was
3 longstanding, pervasive, well-documented, or expressly noted by prison officials in the past,"
4 id. at 842, 114 S. Ct. at 1981, the circumstances must also suggest that "the defendant-official
5 being sued had been exposed to information concerning the risk and thus 'must have known'
6 about it." Id.

7 The Montgomery affidavit falls far short of making this showing. First, there is no
8 allegation that any risk created by policy DI 67, as implemented as the Alhambra Facility,
9 was "longstanding, pervasive, [or] well-documented." Further, there are no circumstances
10 presented to suggest that Director Schriro had any information concerning this "obvious
11 risk." Instead, the undisputed facts show that as of September 25, 2003, the date of the
12 assault, defendant had served as Acting Director for only eleven weeks and no allegation is
13 made that Schriro became aware of any safety issues regarding housing sex offenders at the
14 Alhambra facility either during or prior to her short tenure. DSOF ¶¶ 49, 51. The facts also
15 show that pursuant to A.R.S. § 41-1604(B)(2)(d), Director Schriro delegated the day to day
16 operations of the prisons to the Division Director of Offender Operations, and the operations
17 of the Alhambra Facility to the Warden of that facility. DSOF ¶ 50. There is no allegation
18 of any prior incident or safety concern due to the implementation of DI 67 at the Alhambra
19 Facility.

20 IV.

21 Based on the foregoing, we conclude that plaintiff has failed to set forth facts
22 sufficient to show that the conditions of his confinement violated his Eighth Amendment
23 rights.

24 Accordingly **IT IS ORDERED GRANTING** defendant's Motion for Summary
25 Judgment (doc. 66).

26 **IT IS FURTHER ORDERED DENYING** Defendant's Motion to Strike Affidavit
27 of Charles Montgomery as moot (doc. 72).

1 **IT IS FURTHER ORDERED DENYING** Defendant's Motion to Strike Plaintiff's
2 Supplemental Rule 26(a)(2) Disclosure and Motion to Preclude the Testimony of Charles
3 Montgomery as moot (doc. 83).

4 **IT IS FURTHER ORDERED GRANTING** Defendant's unopposed Motion for
5 Leave to File Supplemental Statement of Facts (doc. 87).

6 **IT IS FURTHER ORDERED DENYING** Plaintiff's Petition for Writ of Habeas
7 Corpus Ad Testificandum as moot (doc. 92).

8 **IT IS FURTHER ORDERED DENYING** the Joint Motion to Expedite Ruling on
9 Pending Motions as moot (doc. 93).

10 || DATED this 12th day of January, 2006.

Frederick J. Martone
Frederick J. Martone
United States District Judge